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No. 91-1748

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1992

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MALCOLM PIRNIE, INC., PETITIONER

*v.*

LYNN MARTIN, SECRETARY OF LABOR

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether an employer that required certain employees to work eight hours a day, paid them overtime on an hourly basis, and followed a policy of reducing their pay when they worked fewer than eight hours a day may retroactively exempt those employees from coverage under the Fair Labor Standards Act of 1938 as "bona fide executive, administrative, or professional" employees by rescinding its policy, reimbursing past deductions, and promising not to reduce pay on account of absences of less than a day in the future.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 949 F.2d 611. The opinion of the district court (Pet. App. 12a-30a) is reported at 758 F. Supp. 899.

### JURISDICTION

The judgment of the court of appeals was filed on November 20, 1991. A petition for rehearing was denied on February 7, 1992. Pet. App. 31a. The petition for a writ of certiorari was filed on May 5, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Section 7(a)(1) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 207(a)(1), requires an employer to pay each of its employees "at a rate not less than one and one-half times the regular rate at which he is employed" for any hours worked in excess of 40 hours a week. Section 13(a)(1) of the Act, 29 U.S.C. 213(a)(1), provides an exemption for "any employee employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor])."

The Secretary's regulations provide that, "[i]n order to attain 'bona fide executive' status, an employee must meet both a salary basis and a duties test." Pet. App. 2a; see 29 C.F.R. 541.1(f) (executive), 541.2(e)(1) (administrative), 541.3(e) (professional). Thus, an employee generally does not qualify as a "bona fide executive" if he is paid hourly or piecework wages rather than a salary.[1] An employee is considered to be paid "on a salary basis" if he regularly receives a predetermined amount of compensation that "is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. 541.118(a). As the district court explained, a "salaried employee is compensated

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[1] Administrative and professional employees may be paid on a fee basis. See 29 C.F.R. 541.2(e)(1), 541.3(e). Professional employees licensed to practice law or medicine need not be paid on a salary basis, 29 C.F.R. 541.3(e), in recognition of the traditional status of these occupations and the licensing requirements governing entry into them. See *Report on Definition of Exempt Employees—Report and Recommendations of Hearing Officer Stein* (1940), *reprinted in* 1949 Wage & Hour Manual (BNA) ¶ 20:116.

not for the amount of time spent on the job, but rather for the general value of services performed." Pet. App. 18a. Under the regulations, an employee may be considered to receive a salary if deductions are made for certain personal absences of "a day or more," but an employee will not be considered salaried if deductions are made for absences of less than a day. 29 C.F.R. 541.118(a)(2) and (3).

The regulations further provide, in a subsection referred to as the "window of correction," that the effect of an impermissible deduction for an absence of less than a day "will depend upon the facts in the particular case." 29 C.F.R. 541.118(a)(6). For guidance, the regulation distinguishes two situations:

> Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

*Ibid.* Thus, "[t]he effect of this 'window of correction' is to retroactively restore exempt status to employees who, *inter alia*, had their pay subjected to reduction for absences of less than a day." Pet. App. 21a.

2. Petitioner is a consulting engineering firm whose approximately 900 employees are classified into 11 pay grades. Pet. App. 3a, 13a. Petitioner considers employees in Grades 1 through 5 to be subject to the

FLSA's overtime requirements, but considers employees in Grades 6 through 9, which includes engineers, accountants, architects, scientists, supervisors, and administrators earning from $30,000 to $70,000 a year, to be exempt under the "bona fide executive" program. *Ibid.*[2]

During the period in question (May 1, 1987, to December 8, 1988), petitioner required all employees in Grades 1 through 9 to work at least eight hours a day. Pet. App. 3a, 13a. It also paid them at an hourly rate for time in excess of those required hours, but employees in Grades 6 through 9 received rates lower than the time and a half required by Section 7(a)(1) of the FLSA. Pet. App. 3a, 13a.[3] Under its February 1986 policy guide, petitioner also provided that employees who lost time "because of inclement weather, car problems, or medical reasons" had to make up the time or charge it to vacation or holidays; "otherwise it will be treated as absence without pay." *Id.* at 14a (quoting policy guide); see also *id.* at 10a (quoting employee handbook: "[t]ime lost from work because of snow, car trouble, etc. is usually considered as absence without pay, but arrangements may be made with your Group Leader to make up the time or to charge it to vacation or optional holidays").

Consistent with these directives, all of petitioner's employees kept time sheets to record all hours they were expected to work, whether or not the time was chargeable to a particular client or project. See Pet.

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[2] The status of employees in Grades 10 and 11, including senior management, Pet. App. 13a, is not at issue in this case.

[3] Employees in Grades 6 to 8 received an hourly rate of time and a quarter, while employees in Grade 9 received straight time pay for working more than eight hours a day or 40 hours a week. Pet. App. 13a.

App. 13a-14a. In some instances, employees who worked fewer than eight hours a day avoided a loss of pay by working extra hours or charging a partial day's absence to sick leave or vacation time. *Id.* at 10a, 16a. Between May 1, 1987, and December 8, 1988, however, 24 employees in Grades 6 through 9 charged about 100 hours of such absences to "absent without pay"; accordingly, they had their pay reduced proportionately and lost a total of approximately $3,300 for these absences. *Id.* at 3a, 14a, 28a.

On December 8, 1988, after the Department of Labor had informed petitioner that it was not paying its employees in Grades 6 through 9 on a salary basis, see C.A. App. 81-82, 211, petitioner changed its policy to require employees in Grades 6 through 9 to charge partial day absences to a new overhead account. Pet. App. 3a-4a. About a year later, after the Department had sued to recover back pay for the affected employees, petitioner repaid the $3,300 it had deducted for absences of less than a day and promised to comply with the salary basis regulation in the future. C.A. App. 3, 52, 60.

3. In its suit, the Department argued that petitioner's Grade 6 through 9 employees were not exempt from the FLSA's overtime requirements because they were paid on an hourly basis. The Secretary sought to require petitioner to pay its employees in Grades 6 through 9 "roughly $500,000 which is the difference between the actual overtime compensated at [petitioner's] rates and that time calculated at the statutory [rate]." Pet. App. 15a.

The district court granted petitioner's motion for summary judgment. It rejected the Secretary's argument that "the 'window of correction' is only available to a company who can show from the outset that

its employees were entitled to exempt status." Pet. App. 21a. Thus, the court did not decide whether petitioner's "employees in grades 6 to 9 were salaried or hourly employees." *Id.* at 17a; see *id.* at 20a ("resolution of this interesting question is not essential to disposition of these summary judgment motions"). It instead "concluded that the 'window of correction' is available to [petitioner], irregardless of how the underlying issue would be resolved." *Id.* at 22a.

The district court held that the improper deductions that petitioner acknowledged to have made were "inadvertent" within the meaning of Section 541.118 (a)(6). The district court acknowledged that the Ninth Circuit had held that a deduction is not "inadvertent" if "an employer has a general policy of deducting for absences of less than a day"; rather, the "window of correction" was designed "for an employer that makes a one-time improper deduction and then corrects its error." Pet. App. 27a, quoting *Abshire* v. *County of Kern*, 908 F.2d 483, 489 (9th Cir. 1990), cert. denied, 111 S. Ct. 785 (1991). The "corporate literature notwithstanding," and despite the fact that petitioner had docked the pay of a number of employees in Grades 6 through 9 who were absent for less than a day, the district court held that petitioner's deductions for less than a day's absence were "inadvertent." Pet. App. 28a. "Two errors in this case led to the dockings," the court said: "The first error is attributable to [petitioner] who erred in the drafting of its time sheets and its corporate literature, failing to foresee how some exempt employees might take the instructions literally. The second error is on the part of the employees who self-docked because they were unaware of how the com-

pany actually handled absences of less than a day by employees in grades 6 to 9." *Id.* at 29a. Although "the dockings were not a one-time error," the court concluded that "their occurrence was infrequent enough to negate the possibility of a pattern." *Ibid.*

4. The court of appeals reversed. Pet. App. 1a-11a. Consistent with the district court, see *id.* at 26a-27a, the court of appeals emphasized that the "window of correction" applied "to one-time or inadvertent deductions, not to a settled policy of subjecting the pay of employees to reductions." *Id.* 9a. The court of appeals disagreed with the district court's conclusion that petitioner "did not have a *policy* of docking pay from grade 6 through 9 employees." *Ibid.*

The court of appeals first noted that it was undisputed that petitioner's Policy Guide, which was distributed to all new employees, "clearly allowed proportional salary deductions for *all* employees—including those paid at grade levels 6 through 9—who did not complete full eight hour days." Pet. App. 10a. The court of appeals added that petitioner's Handbook of Information for Staff similarly stated that all employees were subject to deductions for absences of less than a day, and that petitioner's Director of Human Resources had indicated that employees in pay grades 6 through 9 "were paid in essentially the same manner" as employees in pay grades 1 through 5, who are admittedly subject to the FLSA. *Ibid.* The court of appeals held that "the evidence before the district court clearly showed that until December 8, 1988, [petitioner] maintained a policy of docking pay to grade 6 through 9 employees for fractions of the workday they missed." *Id.* at 11a. The court also "note[d] that a company's general requirement that its employees work at least eight hours in a day strongly suggests that the company views these employees as hourly and not salaried." *Id.* at 10a.

## ARGUMENT

The court of appeals' decision is correct. The decision does not conflict with any decision of this Court or any other court of appeals, and review by this Court is not warranted for any other reason.

1. As this Court has long recognized, FLSA exemptions "are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); see also *Citicorp Indus. Credit Inc.* v. *Brock*, 483 U.S. 27, 35 (1987); Pet. App. 6a. Employers have the burden of proving their entitlement to an exemption. *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 196-197 (1974); *Arnold*, 361 U.S. at 394 n.11.

In the Department of Labor's view, the "window of correction" in Section 541.118(a)(6) is a narrow exception to the requirement that an employee does not qualify as a "bona fide executive" if he is paid hourly wages rather than a salary. The regulation makes clear that employees who are sent home when there is no work to be done are not "bona fide executives." It also makes clear, however, that "the exemption will not be considered to have been lost" on account of an "inadvertent" deduction for an absence of less than a day if the employer corrects the error. The district court and the court of appeals differed with respect to whether the deductions at issue in this case were "inadvertent." In our view, the court of appeals was clearly correct in deciding that a series of deductions made in accordance with written company policy may not be termed "inadvertent." In this Court, petitioner does not defend the district court's contrary conclusion.

Petitioner instead contends that an employer may subject employees to deductions for absences of less than a day pursuant to established policy, and nevertheless avoid liability for FLSA overtime pay if, when the policy comes to light, the employer changes it. That is not how the Department of Labor understands its regulation. The Department's construction helps to "prevent the incongruous situation of employers cynically undertaking corporate policies which subject the salaries of their professional, managerial and administrative employees to reduction for reasons other than lack of work, knowing that the exempt status of the affected employees would be restored through reimbursement and a promise to comply, if the employer is caught." Pet. App. 26a.

The language of the regulation does not require petitioner's construction. In arguing to the contrary, petitioner points to the language in the "window of correction" regulation stating that exempt status will not be considered to have been lost in some circumstances where an improper deduction "is inadvertent, *or* is made for reasons other than lack of work." Pet. 9. But that does not mean that employers can cure all improper but deliberate deductions other than those made for lack of work. Petitioner concedes as much by stating that a "good faith" requirement must be read into the regulation. Pet. 14 n.10. In fact, it is not necessary to rewrite the regulation, which begins by stating that the effect of an impermissible deduction "will depend upon the facts in the particular case." In the Department of Labor's view, where the employer has a written policy, which has been implemented repeatedly, of making deductions for absences of less than a day, the window of correction is not open.

There are cases where a deliberate deduction (if "made for reasons other than lack of work") for less than a day's absence would not close the window. For example, an employer might be able to cure an advertent, one-time deduction made because a group of professional employees, who clearly were paid on a salary basis, left work to attend a baseball game. Under all the facts of such a case, the decision to "dock" the employees' pay might not indicate that the employees were, in fact, paid by the hour, and the employer could cure the deduction under the window of correction without incurring liability to pay overtime under the FLSA. But nothing of the sort occurred here. To the contrary, petitioner had a written policy that, consistent with its other policies concerning employees in pay grades 6 through 9, treated those employees as wage earners rather than as salaried employees. Petitioner required those employees to work eight hours a day, calculated an hourly rate of pay for those employees, and paid them overtime, albeit at a rate less than that required by the FLSA, for hours worked in excess of 40 per week. Pet. App. 13a. In addition, their pay was generally subject to deduction for absences of less than a day.[4]

Whether petitioner's employees qualify as "bona fide executives" now that deductions are no longer made for absences of less than a day was not decided

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[4] Amicus National Security Industrial Association opines that "[d]eductions made for lack of work are evidence that the employee is really an hourly worker; other deductions do not necessarily bear that implication." Br. 11. But in this case, petitioner's policy of deducting pay for absences of less than a day, together with petitioner's other pay policies, indicate that employees in pay grades 6 through 9 were not salaried.

by the courts below. But under "the facts in th[is] particular case," 29 C.F.R. 541.118(a)(6), including petitioner's policy of deducting pay for absences of less than a day, the employees at issue were not exempt and petitioner could not retroactively convert them into exempt employees just by reimbursing past deductions and promising not to make deductions for absences of less than a day in the future.[5]

2. Contrary to petitioner's assertion, Pet. 10-12, review is not necessary to resolve any conflict between the decision below and *Hartman* v. *Arlington County*, 720 F. Supp. 1227 (E.D. Va. 1989), aff'd, 903 F. 2d 290 (4th Cir. 1990), or *International Ass'n of Fire Fighters, Alexandria Local 2141* v. *City of Alexandria*, 720 F. Supp. 1230 (E.D. Va. 1989), aff'd mem., 912 F.2d 463 (4th Cir. 1990). Although those cases suggest that the window of correction may be available to an employer that followed a policy of making impermissible deductions, it is not at all clear that the Fourth Circuit would apply the window of correction under the circumstances of this case.

The effect of an impermissible deduction "depend[s] upon the facts in the particular case," 29 C.F.R. 541.118(a)(6), and the facts in this case differ from the facts in *Hartman* and *Fire Fighters*. For example, petitioner's pay system violated the

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[5] Amicus American Consulting Engineers Council states that in engineering firms many employees, "even top executives, account for their time," and contends that the court of appeals' decision calls that practice into question. Br. 9. This amicus is attacking a straw man. The court of appeals did not conclude that petitioner's employees in grades 6 through 9 were not exempt from the FLSA because they accounted for their time. They were held not to be exempt because, unlike "top executives," they were required to work eight hours a day, were docked pay if they worked less, and were paid overtime for hours worked beyond 40 in a week.

"salary basis" requirement not just because of impermissible deductions, but also because it treated purportedly exempt workers just like non-exempt workers in a number of respects. For example, petitioner paid both groups of employees more for overtime hours, subjected their pay to reductions if they worked less than eight hours a day, and required them to work a fixed workday. Pet. App. 13a; see also *Harrison* v. *District of Columbia*, 30 Wage & Hour Cas. (BNA) 557, 561 (D.D.C. 1991) (holding that certain employees were not salaried because they "are treated like hourly employees in more respects than simply being subject to reductions in pay"). Petitioner's pay system is similar to the scheme in *Thomas* v. *County of Fairfax*, 758 F. Supp. 353 (E.D. Va. 1991), in which another district court within the Fourth Circuit ruled that employees paid on an hourly basis were not exempt employees. In contrast, the plaintiffs in *Hartman*, 720 F. Supp. at 1229, were paid without regard to the number of hours worked.[6]

Also, *Hartman* and *Fire Fighters* involved public employers, whose pay practices are generally "designed and intended to serve the public trust and were

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[6] It is not clear whether the district court correctly held that the firefighter employees in *Hartman* met the salary basis test. The employer in that case allegedly had a policy allowing reductions for partial day absences, and seven employees, who were not employed by the Fire Department, had their pay reduced for partial day absences. 720 F. Supp. at 1229-1230. The court did not expressly find that such a policy existed, however, see *id.* at 1229 ("the County may or may not have complied with the FLSA on this point in the past"), and stated that there was "no dispute that plaintiffs are salaried employees," *id.* at 1230. The court may therefore have permissibly concluded that if a policy did exist, it did not apply to the Fire Department. Cf. Pet. App. 10a (rejecting petitioner's argument that its policy existed only for non-exempt employees in Grades 1 through 5).

established long before State and local government employees were subject to the Fair Labor Standards Act." 56 Fed. Reg. 45,825 (1991). The pay practices of public employers are constrained by constitutional and statutory provisions. *Ibid.* Those practices are generally based on the principles "that governmental employees should not be paid for time not worked, and that there is a need to be accountable to the taxpayers for the expenditure of public funds." *Ibid.* These constraints have created difficulties for local governments in ascertaining and complying with the FLSA, which was extended to cover such employers fairly recently. See 56 Fed. Reg. 45,824-45,825 (1991); *Harkins* v. *Chesapeake*, 29 Wage & Hour Cas. (BNA) 1399, 1400 (E.D. Va. 1988). The Fourth Circuit may have been influenced by these considerations when it affirmed the district court's decisions in *Hartman* and *Fire Fighters*.

Moreover, it is not clear that the Second and Fourth Circuits disagree on the applicable legal principles. The Fourth Circuit affirmed *Hartman* on the district court's reasoning, 903 F.2d at 292, and affirmed *Fire Fighters* without opinion.[7] Thus, the Fourth Circuit has yet to discuss the prerequisites for application of the "window of correction." Further, the district court in those cases appeared to assume that the questioned deductions were "inadvertent," even though they also seemed to assume that a policy of making such deductions existed. See Pet. App. 23a-24a. The district court in *Hartman*, the case resulting in a brief published affirmance, explicitly stated that "the County had inadvertently deducted salary from seven

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[7] Unpublished opinions are not binding in the Fourth Circuit. See 4th Cir. I.O.P. 36.5, 36.6; *Hupman* v. *Cook*, 640 F.2d 497, 501 & n.7 (4th Cir. 1981).

exempt employees for absences of less than one full day." 720 F. Supp. at 1230. In this case, in contrast, petitioner does not now contend that it acted inadvertently.[8] In sum, any conflict between the results in *Hartman* and *Fire Fighters* and the decision below is not sufficiently fixed to merit this Court's attention at this time.

3. Petitioner has not established its claim, Pet. 16-17, and that of its amici, that the Department's interpretation of Section 541.118 will have a devastating impact on employers. Petitioner's problems arise not from the Department's interpretation of its regulation but from petitioner's pay policy, which combined exempt and non-exempt employees and treated both like hourly workers in many ways, including requiring deductions for absences of less than a full day. Petitioner could have avoided these problems simply by not instituting such policies: employers can pay salaries or pay overtime at the rate of time and a half.

Petitioner's "tens of billions of dollars" cost prediction, Pet. 17, is misplaced because it is based largely on the possible impact of the salary basis regulation on state and local governments. See Pet. 17 n.3. The Department of Labor recognizes that such public employers may well have difficulties complying with the salary basis regulation because they were only re-

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[8] Similarly, a court in the Fourth Circuit could conclude that the deductions affecting only seven non-plaintiff employees in *Hartman* and 26 non-plaintiffs in *Fire Fighters* over almost three years were infrequent enough to qualify as "inadvertent" under 29 C.F.R. 541.118(a)(6), while petitioner's 100 deductions affecting 24 Grade 6 through 9 employees over a 19-month period, along with an unspecified number of additional deductions affecting employees in lower grades, were not inadvertent.

cently subjected to FLSA requirements, see *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), and must sometimes comply with constitutional and statutory provisions limiting their pay practices.[9] Accordingly, the Department has proposed regulations that would allow state and local governments to avoid such potential liabilities. See 56 Fed. Reg. 45,824, 45,826 (1991) (interim final rule concerning future liabilities); *id.* at 45,828, 45,830 (proposed regulation concerning accrued liabilities).[10] Private employers such as petitioner, who have been on notice for more than 30 years that they must pay engineers on a salary basis if they wish to take advantage of the exemption, see *Craig* v. *Far West Eng'g Co.*, 265 F.2d 251, 257-260 (9th Cir.), cert. denied, 361 U.S. 816 (1959), cannot complain of similar difficulties.

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[9] As petitioner recognizes, Pet. 12 n.8, most of the litigation concerning the salary basis requirement involves state and local governments. Under the Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 2(c), 99 Stat. 788, those employers are liable for violations of the FLSA occurring after April 15, 1986.

[10] District courts in California recently invalidated the interim final regulation for not complying with the Administrative Procedure Act's notice and comment requirements. See *Morsch* v. *City of Los Angeles*, No. CV 91-0401 JGD (C.D. Cal. May 4, 1992); *Service Employees Int'l Union, Local 102* v. *County of San Diego*, 784 F. Supp. 1503 (S.D. Cal. 1992) and *Alex* v. *California*, 30 Wage & Hour Cas. (BNA) 1353, 1358-1360 (E.D. Cal. 1992). Legislation has also been introduced to change the salary basis rule for public employers. See S. 1670, 102d Cong., 1st Sess. (1991), discussed at 137 Cong. Rec. S12,253 (daily ed. Aug. 2, 1991); H.R. 5112, 102d Cong., 2d Sess. (1992), 138 Cong. Rec. H3087 (daily ed. May 7, 1992).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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